Civil Justice Council submissions
"Jackson, one year on"

1. Introduction

1.1 Weightmans LLP is a top 40 law firm with 1,400 employees with one of the largest national defendant litigation solicitor practices and an annual turnover in civil litigation work of approaching £60 million. Weightmans LLP deals with motor, liability and other classes of claim for clients from the general insurance industry, other compensators including the NHSLA and self insured commercial and public sector organisations such as local authorities and Primary Care Trusts.

2. Types of case being taken on and not taken on

2.1 We have seen no evidence across the market that there has been a failure or inability of the market to match potential claimants to claimant lawyers.

2.2 The personal injury market continues to be a fierce hunting ground. The claimant across all lines of business still remains a valuable commodity. Evidence for this can be found in various national and local media campaigns and a rise in the "cash up front" offer made by a number of claimant firms to attract claimants. It is of concern that such offers may be misinterpreted by claimants to represent a cash bonus rather than an interim payment on account of damages.

2.3 In the motor arena there are frequently two separate claims made, arising from the same accident, where the claimant is represented by one law firm as regards his/her low value personal injury claim in the portal, and by another firm who will 'represent the claimant' in the credit hire claim. The latter is always dealt with outside of the portal, thereby increasing the potential for costs on a standard basis when Part 7 proceedings are, invariably, issued.

2.4 Where firms act in the recovery of the credit hire charges only, and who in reality have been instructed by the credit hire organisation (CHO) and not the claimant, there is often significant prejudice to both the claimant, who seeks to pursue a claim for personal injury, and the defendant insurer.

2.5 In the case of the claimant, and subject to terms of settlement of the hire charges, he/she may be estopped from pursuing a claim for personal injury where a claim for hire has concluded. Equally, the insurer is prejudiced by the additional costs incurred in dealing with 'two claims' and liaising with two different firms of solicitors.

2.6 Equally, where one firm acts for the claimant in pursuit of the recovery of all losses, damages etc incurred through the portal, they often take advantage of the lack of governance relating to the requirement for, and presentation of, or interrogation of, evidence.

2.7 Whilst it was felt that courts were more aware of the subtle technical nature of credit hire claims, defendants are now on the back foot, having to respond to poorly presented credit hire claims within the portal in an attempt to interrogate the claim at Stage 2 or otherwise attempt to present a defence, based on limited evidence, at future Stage 3 hearings to enable judges to understand the issues and the implications of the paucity of the evidence presented by the claimant.

2.8 As a result of the MoJ's approach of attempting to 'squeeze' credit hire claims through a portal not adequately designed to deal with such claims (as is supported by recent discussions surrounding the introduction of a credit hire- specific portal) defendants are paying the cost through unjust and excessive awards.

2.9 In addition, given the increase in the small claims track limit, you arrive at a 'fall back position' for dealing with credit hire claims, most of which proceed in the small claims track, where the regular rules of evidence do not apply and no expert evidence is allowed.

2.10 The result is that whether a claim for credit hire charges is made through the portal, or via Part 7 proceedings, CHOs and/or their solicitors race towards a final hearing with scant heed to the need for evidence beyond the minimum they consider will tip the 'balance of probability' in their favour. Defendants and their clients are therefore going to a hearing which is a lottery because the courts are permitting a poorly evidenced case to be presented within a limited time window. Courts should not tolerate this approach and should impose sanctions on those who do not meet their obligations in providing cogent evidence.

2.11 So, in summary, few credit hire claims are pursued through the portal, and given the lack of risk that claimant solicitors are now exposed to with the small claims track limit being increased to £10,000, more claims are being pursued to a final hearing, where previously claimant solicitors may have been open to negotiation.

2.12 We have also seen an expansion of claimant firms, particularly in the disease, clinical negligence and travel claims areas. This is driven by a quest to follow perceived richer pickings in these areas

3. Funding

3.1 We have seen little appetite for damages based agreements in the personal injury market and as such, we must reserve judgment.

3.2 The volume of "old world" funded cases that are proceeding through the litigation process and the limited number of "new world" cases that have reached conclusion has meant that the impact of Qualified One Way Costs Shifting (QOCS) has not yet taken effect. Whilst the "trade off" between the virtual eradication of CFAs, ATE premiums and QOCS is appreciated, we believe that QOCS is likely to fuel more speculative claims and situations where defendants are effectively held to ransom by claimant firms – having to pay for the privilege of defending claims.

3.3 This is particularly the case for disease claims which, historically, have attracted successful repudiation rates in excess of 50 % due to difficulties claimants experience on limitation, causation or breach of duty grounds.

3.4 Whilst the disease market has been flooded with "old world" cases, particularly noise induced hearing loss claims, we have seen some, albeit limited, evidence that, despite fundamentally weak cases, claimant firms are pushing cases on to trials attempting to use QOCS as a lever to force a settlement from defendants.

3.5 All stakeholders involved in the civil litigation process wish to discourage and eliminate fraudulent claims. Whilst QOCS protection will be lost if the claim is found to be fundamentally dishonest on the balance of probabilities there have been no judicial decisions or guidance on what constitutes "fundamental dishonesty". This uncertainty means that either defendants are forced to settle cases, and potential fraudulent cases are not challenged, or accept that they have no means of redress in respect of defence costs if served with notice of discontinuance.

4. Costs budgeting and case management by the courts

4.1 Costs budgeting

4.1.1 As a matter of logic, Weightmans and its clients "buy" the idea of knowing what the "legal journey" looks like up front rather than being, as Lord Justice Jackson put it "disappointed almost as soon as it had begun". The idea of being able to price tag the constituent parts of a case makes good sense.

4.1.2 Initial reaction suggests that whilst the theory behind budgeting is sound, the practice and application of the theory needs substantial work to deliver the intended benefit. Without those changes it is too soon for compensators to confirm by data that budgeting is working for them. Budgeting currently has a feel of being a less streamlined and therefore potentially more costly process than was intended.

4.1.3 Accordingly, we divide our comments into both pros and cons (below) but temper this by stating that whilst in theory costs budgeting should have advantages, in practice, our experience has been almost universally negative in cases with a value of less than £100,000.

4.1.4 Pros (theory)

- Early opportunity to control costs.
- More accurate reserving for compensators through the early "heads up " on costs so that practitioners and their clients are thinking costs from day one of a case.
- Promotion of settlement through early awareness of costs.
- Potential reduction of costs through delay being met by sanctions for non compliance with court deadlines

4.1.5 Cons (in practice)

- Diversity of judicial interpretation means practitioners and their clients lack certainty over how a court will deal with budgeting; for example, when there is a need to have a costs budget or hold a CMC hearing. This has lead to multiple adjournments and unnecessary personal attendance at hearings from Barrow in Furness to Basingstoke. This increases costs for clients and causes delay which is the enemy of justice.
- Many courts also deal with directions and costs as separate tranches or discrete issues within the CMC which risks disconnect in controlling costs. The better way to ensure that proportionality is built into the budgeting process is to deal with directions individually and at the same time examine the budget for that phase. We understand this may have been the method which was recommended as part of the judicial training programme. Combining the litigation and costs aspects of these CMCs can require double manning by legal and costs experts which is another additional up front cost, although it is conceded that this may reduce the cost of the costs at the back end of the claim.
- No defined "challenge" process to budgets and inconsistent jurisprudence. CMC hearings are becoming more like mini skeleton arguments on an opponent's budget, risking converting the CMC into a mini costs assessment hearing. A court form would assist. Parties have had to compile their own.
- Increased need for personal attendances rather than telephone or writing adding substantial cost to the process. Are we returning to the practices that were prevalent pre-Woolf?
- Evidence of "tactical" budgets – claimant firms building fat into the budget in anticipation of reductions. Budgeting is now perhaps being seen as the "golden goose" by which claimant firms aim to restore profits which have been chipped away by the advances in fixed fee regimes.
- Only very limited examples of budgets being reduced and varied judicial appetite for intervention. We are aware of one example of one court not engaging in the process (albeit for understandable reasons of judicial alacrity).
- Inadequate time (filing budget 7 days prior to CMC) to allow parties to engage in agreement/negotiation.

4.1.6 Once post-litigation budgeting settles and the process is improved, attention needs to shift to introducing budgeting concepts into the pre-litigation period. This will prevent unnecessary costs from being incurred. We recommend consideration be given to provision of a budget with or shortly after the letter of claim in matters of substance.

4.2 Judicial delays

4.2.1 Courts have demonstrated inconsistencies in listing and there has been an increase in adjourned hearings. We have also seen an increased number of trials postponed at the last minute due to the unavailability of judges given the pressure placed on the courts by costs budgeting hearings but also, we suspect, by Mitchell applications.

4.2.2 There is overall strong evidence that the need to consider costs budgeting is leading to substantial delays in Courts listing hearings and processing litigation.

4.3 Portal

4.3.1 The generic problems we have experienced may be summarised as follows:-

- Inadequate information on CNF.
- Locating policyholder's portal information when they are not the employer (EL/PL portal).

4.3.2 We do however suggest that certain modifications could be made to improve the process.

- Introducing a time limit for presentation of Stage 2 packs after Stage 1 is closed.
- Time period for payment of stage 1 costs and time limit for withdrawal of admission on causation to be the same – 15 days.
- Clarifying clause 4.3.8 to restrict exempt claims to claims in relation to harm, abuse or neglect of or by children or vulnerable adults rather than minors per se.

4.3.3 The extension to cover EL/PL casualty claims is welcomed. However, in our view, the portal is insufficient and ill adapted for dealing with disease claims. The Portal Company's latest report to cover the period 31 July 2013 to 31 January 2014 (6 months) indicates that only 8 claims have settled out of a total of 3,800 claims intimated through the process.

4.3.4 The problems are twofold:-

- An insufficient number of claims are flowing through the process.
- The present protocol is simply unworkable from a compensator's perspective.

4.4 Allowing more captured claims to remain in the portal

4.4.1 Our own empirical research has confirmed that less than 5 % of noise induced hearing loss claims at present are intimated through the portal process, yet prior research had indicated that between 30 % and 40 % were capable of being captured as a single defendant.

4.4.2 That research has also confirmed that certain firms have intimated less than 1 % of the total number of claims they have made overall through the portal process. We suggest that this has not been as a consequence of deliberate filtering out of single defendant cases at the "sign up" stage.

4.4.3 The plain statistics are that only 8 disease claims of 3,800 claims made have settled with the overwhelming majority exiting the process.

4.4.4 There is currently no requirement for the claimant to provide proof of employment, any information to identify the date the cause of action arose for limitation purposes or indeed a medical report to support causation. At the very least the CNF should include all information required for a compliant letter of claim under the Pre Action Protocol for Disease and Illness claims and the claimant's authority to access to personnel and medical records to enable defendants to investigate the claim.

4.4.5 All these issues are central and crucial to the proper appreciation of any potential liability. The majority of disease claims by their very nature are "long tail", and involve often defunct companies with no records. The absence of any requirement to make the claimant provide proof of employment places the defendants in an impossible position. This leads to claims exiting the process.

4.4.6 Medical causation is central to disease claims and issues such as foreseeability and breach of duty are inextricably linked with causation. The requirement to make a formal admission of liability will in many instances affect the conclusions reached by the medical expert. Its absence at Stage 1 leads to an inadequate number remaining in the system.

4.4.7 Thirdly, whilst the defendants can resile from a Stage 1 admission if the medical evidence is unfavourable, there is no such ability in relation to limitation, even though there is no requirement for the claimant to confirm that no claim has been made before.

4.4.8 We suggest amendments to the process in respect of noise induced hearing loss claims which commonly present in greatest numbers. Our proposed amendment to the CNF is set out at Appendix A.

4.5 Capturing more disease claims through the portal

4.5.1 The market in EL casualty claims is predicted to receive 15,000 EL claims through the portal for the first year since its introduction.

4.5.2 Yet the disease market received in excess of 80,000 claims for noise induced hearing loss in calendar year 2013. Similar high volumes are predicted for 2014.

4.5.3 It is our view that given the huge volume of such claims, proper resource and time should be devoted to ensuring that a proper Protocol is implemented specific for noise induced hearing loss and to reduce cost from the process. We believe that the portal can and should be amended to capture multi-defendant claims. The volume of noise induced hearing loss claims demands its own bespoke portal and protocol given that very few claims sound high in damages, which would allow compensators to concentrate properly on other disease claims whereas the present system is simply clogged by low value noise induced hearing loss claims. Our proposed amendments are set out in Appendix B.

5. Conclusion

Our proposed recommendations are as follows:-

5.1 Whilst we appreciate that issues are continuing to evolve and in theory, costs budgeting may bring benefits, our experience suggests fairly radical steps must be taken to reduce cost and delays.

5.2 This may be to restrict budgeting to above £50,000 or £100,000 in value - relying upon the "old" system of costs estimates and robust assessment. We also believe that the challenge process must be more clearly defined and that a more consistent judicial interpretation is badly needed.

5.3 EL disease portal

5.3.1 The introduction of a bespoke portal for noise induced hearing loss claims - please see appendix B which should sit alongside our recommended changes to the present process.

Further information

For any further information please contact:

- **Rob Williams**, Solving Disputes Director 0845 070 3852 or email rob.williams@weightmans.com
- **Jim Byard**, Head of practice area – Disease, 0116 253 9747 or email jim.byard@weightmans.com
- **Judith Peters,** Consultant – Disease , 0151 242 7962 or email judith.peters@weightmans.com

Appendix A

Please attach an IRS or other document as proof of employment with the defendant and identify whether this defendant is named on the Schedule.

Please confirm that ELTO searches have been carried out and the extent of EL cover revealed.

Previous claims.

Please confirm whether the claimant has previously sought to pursue a claim for compensation for industrial deafness/tinnitus against any company with whom the claimant has been employed since leaving school.

☐ Yes ☐ No

Whether the claimant has previously instructed any solicitor prior to my current solicitors to pursue a claim for industrial deafness on my behalf, and whether he has pursued a claim for compensation for industrial deafness under any scheme organised by insurance companies and trade unions.

☐ Yes ☐ No

Please confirm a medical report is annexed to the CNF.

☐ Yes ☐ No

Appendix B

Amendments to EL D1 to incorporate other defendants

Is a claim made against other defendant(s)

☐ Yes ☐ No

If 'YES', please identify

Other defendant(s) details.

Defendant(s) name(s) and address(es)

D2	
D3	
D4	
D5	
D6	
D7	

Policy number, reference.

D2	
D3	
D4	
D5	
D6	
D7	

Insurers/compensators' details (if known)

D2	
D3	
D4	
D5	
D6	
D7	